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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re LARAY M., a Person Coming Under
the Juvenile Court Law.

B187822

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

(Los Angeles County
Super. Ct. No. J985616)

Plaintiff and Respondent,

v.

LARRY A.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Margaret S. Henry, Judge. Affirmed.

Anna L. Ollinger, under appointment by the Court of Appeal, for Appellant.

Raymond G. Fortner, Jr., County Counsel, Larry Cory, Assistant County Counsel, and Lisa Proft, Deputy County Counsel, for Respondent.

Larry A. (appellant) appeals from the December 16, 2005, dependency court order (1) denying his Welfare and Institutions Code section 388 petition to modify a prior order denying reunification services; and (2) terminating his parental rights to his daughter, Laray M.¹ He contends the trial court abused its discretion in denying the petition. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Laray was born June 29, 2004. No father is identified on her birth certificate. Laray came to the attention of the Department of Children and Family Services (DCFS) on September 18, 2004, when she was detained after mother, a long-time drug abuser, left Laray with a babysitter and disappeared for two days. The section 300 petition filed on September 22, 2004, identified “Larry Emerson” as Laray’s alleged father and stated that his whereabouts were unknown.

On September 30, 2004, mother told a dependency investigator that Laray’s father was appellant, not “Larry Emerson,” and that appellant was then incarcerated at Susanville State Prison, serving a three year prison sentence for drug related offenses. On October 21, 2004, an amended section 300 petition was filed which identified appellant as Laray’s alleged father and added an allegation that Laray came within section 300, subdivision (b) [failure to protect], because appellant “has an extensive criminal history including but not limited to arrests and convictions for possession and sales of narcotics and is currently serving a three year sentence for possession and sales of cocaine and a parole violation. Such conduct endangers the child’s physical and emotional health and safety, creates a detrimental home environment and places the child at risk of harm and damage.” That day, Laray was placed with a maternal cousin, Cassandra M. Laray has remained in that placement throughout these dependency

¹ In an unpublished opinion, we denied appellant’s writ petition seeking review of an earlier order denying appellant presumed father status and reunification services (B180694). All future undesignated statutory references are to the Welfare and Institutions Code.

proceedings, and Cassandra has since been identified as a prospective adoptive parent for Laray.

On November 23, 2004, the amended petition was sustained as to mother, and mother waived reunification services. But, because appellant did not appear and was not represented at that hearing, adjudication of the allegation against him was held in abeyance. Appellant (incorrectly identified in the minute order as “Larry Emerson”) appeared on December 16, 2004. That day, appellant signed a statement of paternity, the amended petition was sustained as to him, and the matter was continued for a contested section 366.26 hearing.

At the section 366.26 hearing on January 20, 2005, the issue was whether appellant was a presumed father within the meaning of Family Code section 7611 and therefore entitled to reunification services. Mother testified that appellant was Laray’s biological father. Appellant testified that, although he had been convicted of drug-related charges three times over the past 10 years, he only sold drugs to other people but did not personally use drugs or alcohol. Appellant testified that he had been living with mother for about a year and a half before he was incarcerated. He financially supported mother during her pregnancy, and, after he was in custody, appellant sold his car to a friend with directions that the proceeds be given to mother in monthly \$500 increments. Appellant had never seen Laray but communicated by letter with mother three times a week and had seen photographs of Laray. While incarcerated, appellant was attending parenting and drug abuse programs in the hopes of eventually regaining custody of Laray. Conceding that appellant was not a presumed father under Family Code section 7611, subdivisions (a) through (f), appellant’s counsel argued that appellant nevertheless qualified for presumed father status under Family Code sections 7573 and 7574 because he signed a voluntary declaration of paternity.² (See Fam. Code, § 7611 [“A man is

² In pertinent part, Family Code section 7573 provides: “. . . [A] completed voluntary declaration of paternity, as described in Section 7574, that has been filed with the Department of Child Support Services shall establish the paternity of a child and shall have the same force and effect as a judgment for paternity issued by a court of competent

presumed to be the natural father of a child if he meets the conditions provided in . . . Chapter 3 (commencing with Section 7570) . . .”].) Unpersuaded, the court found that appellant was not a presumed father. It further found that Laray’s best interests rested in permanency and that it would be detrimental to delay establishing a permanent placement plan until appellant was released from prison. Accordingly, pursuant to section 361.5, subdivision (e)(1), the court ordered that appellant receive no reunification services.³ In an opinion filed April 28, 2005, we found both orders were supported by substantial evidence and affirmed.

Meanwhile, after Cassandra expressed a desire to adopt Laray, DCFS was ordered to begin providing permanent placement services and to initiate an adoptive home study. DCFS opined that it would be in Laray’s best interest to be adopted by Cassandra and recommended that parental rights be terminated to free Laray for adoption. After a number of continuances, the matter was set for a section 366.26 hearing on December 13, 2005, after appellant was expected to be released from prison.

That day, appellant appeared at the hearing and filed a section 388 petition seeking to modify the prior orders denying him presumed father status and reunification services. In support of the petition, appellant alleged the following changed circumstances: “I am

jurisdiction. The voluntary declaration of paternity shall be recognized as a basis for the establishment of an order for child custody, visitation, or child support.” Family Code section 7574 describes the requisite contents of the “voluntary declaration of paternity” form.

³ In pertinent part, section 361.5 provides: “(a) . . . Upon a finding and declaration of paternity by the juvenile court or proof of a prior declaration of paternity by any court of competent jurisdiction, the juvenile court may order services for the child and the biological father, if the court determines that the services will benefit the child. [¶] (e)(1) If the parent or guardian is incarcerated or institutionalized, the court shall order reasonable services *unless the court determines, by clear and convincing evidence, those services would be detrimental to the child*. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered. . . . Reunification services are subject to the applicable time limitations imposed in subdivision (a). . . .” (Italics added.)

out of prison; I have a parole officer; I have a job in line; I participated voluntary in AA and parenting classes in prison; I requested visits (denied); I requested information from caretaker (not responding); I asked child to be brought to court for a visit (I was not brought in); I have housing referrals; all services in place.” He alleged that modification would be in Laray’s best interests because: “The child needs a father; while I take responsibility for being incarcerated, I do not want my daughter to think I gave up on her. I have not been given any real chance to obtain custody of my daughter. I am not an habitual criminal. I am 53 years old. This is my only time to be a parent.”

At the hearing, social worker Nhid Alikhan testified that all notices and reports were mailed to appellant in prison, except for one report which was incorrectly mailed to “Larry Emerson.” Although Alikhan’s name and number appear on the documents mailed to appellant, and she is able to receive collect calls, appellant never called or wrote to Alikhan. Appellant also did not contact Alikhan when he was released from prison.

Appellant testified that he was 53 years old and had always represented to the public that he was Laray’s father. At the time dependency proceedings commenced, appellant was incarcerated with about a year left on his sentence. Appellant claimed he never received any reports about the proceedings while he was in prison, although he did receive a pass to be brought to court. Appellant kept abreast of how Laray was faring through his attorney. Appellant took parenting classes and attended substance abuse programs while in prison because he wanted to obtain custody of Laray, who he had never met. While incarcerated, appellant never asked the court about visits with Laray; since leaving prison, appellant had not known who to ask. Appellant never asked his attorney to give him the name and number of the social worker. Appellant initially testified that he did not know who was taking care of Laray; but he later stated that he knew that Laray was with Cassandra, had in fact corresponded with Cassandra, but had been advised by his prison counselor not to contact Cassandra again to avoid confusing things. Since being released from prison, appellant was receiving services from the Volunteers of America, a veteran’s group, including housing, parenting classes and

substance abuse programs. Appellant had been arrested a number of times for selling drugs, but never for using drugs. Appellant understood that Laray could not wait forever for him to become a father, but he wanted the court to give him “monitored visits and maybe help me get my daughter back and get a job, and get an apartment, get my daughter back to me.” In response to the question “What is different about you today than it was when we came to court in December?” appellant testified: “To tell you the truth, I’m still the same person. As far as being sober, I’ve been sober all my life but the responsibility I have – I didn’t have that before I got locked up. This is my flesh and blood. I never had a child before. I have a whole lot of things in my mind and I am pretty much, you know, a capable person. I just want to raise my daughter.”

The court denied the petition observing that, although appellant’s release from prison constituted a change in circumstance, there was no showing that it would be in Laray’s best interest to provide reunification services to appellant when there was an adoptive home available. The court terminated parental rights and transferred custody to DCFS for purposes of adoption planning and placement.

Father filed a timely notice of appeal.⁴

DISCUSSION

A. *Denial of appellant’s section 388 petition was not an abuse of discretion.*

Appellant contends the court abused its discretion in denying his section 388 petition to modify the prior orders denying him presumed father status, reunification services and visitation. He argues that finding appellant to be a presumed father is in Laray’s best interest because “[i]n addition to financial benefits, there are emotional benefits that flow from the establishment of paternity. In this case, Laray is young

⁴ The notice of appeal indicates that it is from the orders of July 21 [appellant a miss out from custody, continuance for proper publication to identity unknown father], October 13 [continuance for appellant’s appearance from custody], November 3 [continuance], and December 13, 2005. But appellant’s opening brief addresses only the denial of his section 388 petition.

enough that in time she can establish a beneficial relationship with her father, who has attempted to protect his relationship to his daughter prior to and during this dependency matter.”⁵ We find no abuse of discretion.

In pertinent part, section 388 provides: “(a) Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made [¶] . . . [¶] (c) If it appears that the best interests of the child may be promoted by the proposed change of order . . . the court shall order that a hearing be held.”

Under section 388, “[t]he juvenile court may modify an order if a parent shows, by a preponderance of the evidence, changed circumstance or new evidence and that modification would promote the child’s best interests.” (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685 (*Amber M.*)). The factors to be considered in determining whether the modification would be in the child’s best interests are: (1) the seriousness of the problem leading to the dependency and the reason for its continuation; (2) the strength of the parent-child and child-caretaker bonds and the time the child has been in the system; and (3) the nature of the change of circumstance, the ease by which it could be achieved, and the reason it did not occur sooner. (*Ibid.*; see also *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 530-532 (*Kimberly F.*)). In *In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*), our Supreme Court cautioned: “In any custody determination, a primary consideration in determining the child’s best interests is the goal of assuring stability and continuity. [Citation.] ‘When custody continues over a significant period, the child’s need for continuity and stability assumes an increasingly important role. That need will often dictate the conclusion that maintenance of the

⁵ We do not address father’s argument regarding the merits of the January 20, 2005, order denying him presumed father status vis-à-vis *Adoption of Kelsey S.* (1992) 1 Cal.4th 816). We affirmed that order in our prior opinion. To the extent father is dissatisfied with that result, his recourse was to petition for review. He cannot reargue the issue in his appeal from the denial of his section 388 petition.

current arrangement would be in the best interests of that child.’ ” Thus, after termination of reunification services, the focus shifts from the parent’s custodial interest to the child’s need for permanency and stability. (*Amber M.*, *supra*, 103 Cal.App.4th at p. 685.)

We review the denial of a section 388 petition for abuse of discretion. (*Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319.) “It is rare that the denial of a section 388 motion merits reversal as an abuse of discretion” (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 522.)

B. No evidence was presented that suggested father was a “presumed father.”

Appellant has not shown any change in circumstances that would warrant granting him presumed father status. We affirmed the January 20, 2005, order denying appellant presumed father status because the Statement Regarding Paternity that father signed at the beginning of the contested disposition hearing did not meet the requirements of Family Code section 7574 or 7572. Father presented no evidence at the section 388 hearing that he had complied with those statutes.

C. The court did not abuse its discretion in refusing to modify its order denying reunification services and visitation.

Appellant has not shown how his change in circumstances would warrant extended reunification services or visitation. Because Laray was just three months old when she was initially removed from mother’s custody, section 361.5, subdivision (a)(2) (§ 361.5(a)(2)) limited reunification services to a period of six months from that date. Pursuant to section 361.5(a)(2), the court could have extended reunification services “up to a maximum time period not to exceed 18 months” but *only* if it was “shown . . . that the permanent plan for the child is that he or she will be returned and safely maintained in the home within the extended time period” and “*only* if [the court] finds that there is a substantial probability that the child will be returned to the physical custody of his or her parent or guardian within the extended time period” (*Italics added.*) The 18-month

period is not tolled by a parent's incarceration. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 452.)

Here, Laray was detained on September 18, 2004. Accordingly, the six month reunification period expired on March 18, 2005, almost nine months before appellant filed his section 388 petition on December 13, 2005. The extended 18 month reunification period would have expired on March 18, 2006, just three months after appellant filed his petition. Under section 361.5(a)(2), the court could have extended reunification services for appellant only if it found there was a substantial probability that Laray would be returned to appellant's physical custody before March 18, 2006. There is no basis in the record for such a finding.

Moreover, appellant has not met his burden of demonstrating that giving him reunification services – which would necessarily delay Laray's adoption – would be in Laray's best interests. First, the problem leading to the dependency with respect to father was that he had “an extensive criminal history including but not limited to arrests and convictions for possession and sales of narcotics and is currently serving a three year sentence for possession and sales of cocaine and a parole violation.” The seriousness of this problem cannot be overstated. And while appellant had recently been released from prison, there was no showing that his recidivism was at an end. Accordingly, this factor militates against giving appellant reunification services.

Second, the evidence established that Laray had not developed any parent-child bond with appellant inasmuch as she had never met him. By contrast, Laray had developed a bond with Cassandra, her prospective adoptive parent. Appellant never asked the court or his lawyer for assistance in making contact with Laray while he was incarcerated. This factor also militates against giving appellant reunification services.

Third, the nature of the change in circumstances was that appellant had been released from prison – although he had not changed his status as a recidivist. Appellant had no control over the timing of that event but it was his own conduct that resulted in his incarceration. Thus the third factor, “the nature of the change of circumstance, the ease

by which it could be achieved, and the reason it did not occur sooner[,]” militated neither for nor against appellant.

Under these circumstances, the dependency court did not abuse its discretion in denying appellant’s petition to modify the prior orders denying him presumed father status and reunification services.⁶

DISPOSITION

The order denying appellant’s section 388 petition is affirmed.

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RUBIN, ACTING P. J.

We concur:

BOLAND, J.

FLIER, J.

⁶ Other than his contention that the dependency court wrongly denied his section 388 petition, father does not assert on appeal any specific error the court made in terminating parental rights. Accordingly, we need not address separately that part of the dependency court’s order.